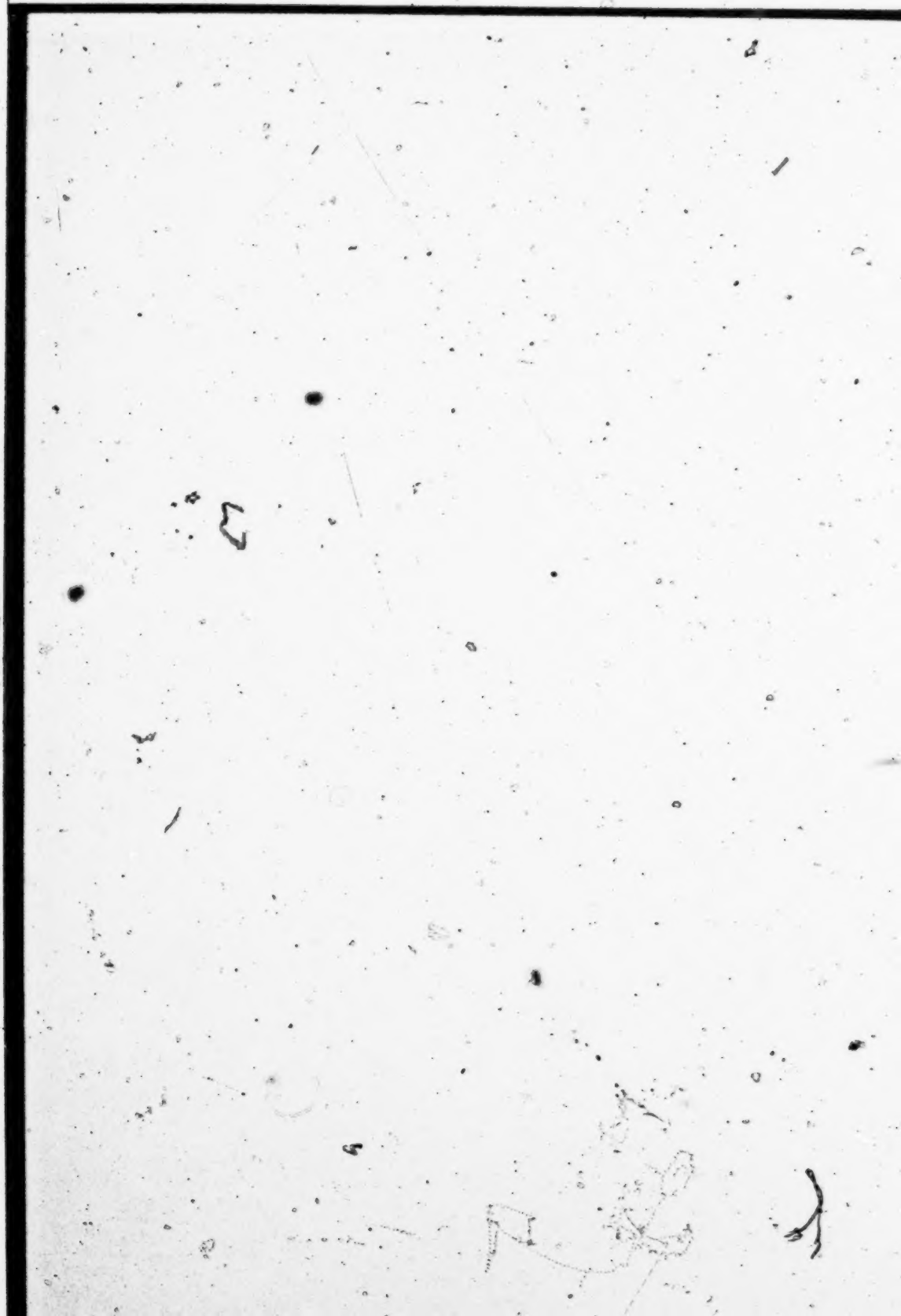

SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

October Term, 1966

No. 807

KENNETH BURKHARD and MORGAN SIEFERT,
Appellants,

v.

THE PEOPLE OF THE STATE OF NEW YORK.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

ANSWER TO MOTION TO DISMISS

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I

The judgment of the State Court was a final judgment.

The appellants both pleaded guilty, pursuant to § 813-c of the Code of Criminal Procedure, reserving the right to appeal on constitutional and statutory grounds. A judgment of conviction was entered, and sentence imposed. The case thus differs from those cited at page 7 of the motion to dismiss, where interlocutory proceedings were involved.

The fact that the Appellate Division and the Court of Appeals have both suggested that appellants might move in the State Supreme Court to withdraw their pleas and go to trial cannot affect the finality of the judgment of conviction. Motions to reduce sentence, to withdraw pleas, for

a new trial, and similar relief are often available to defendants in criminal cases under a variety of circumstances. The existence of such post-judgment relief, or even the likelihood that it will be granted does not change the character of the judgment.

II

This Court has jurisdiction.

This case comes squarely within the decision of this Court in *NAACP* v. *Alabama*, 357 U.S. 449, where jurisdiction was challenged because, the state claimed, the wrong procedure had been followed in the state court. This Court disagreed, pointing out that petitioner had followed established procedural routes in seeking review of its constitutional claims in the state court. This Court said, at 357 U.S. 457:

> "Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights."

Here appellants followed what were, at the time, established procedural requirements. In the State Supreme Court, the District Attorney and the presiding judge both agreed that appellants were proceeding properly to get review of their constitutional contentions (A 242-255; A 93). Their agreement was well-founded. See *Siegel* v. *People*, 16 N.Y.2d 330, 332 (1965); *People* v. *Rodriguez*, 11 N.Y.2d 279 (1962); *People* v. *Cohen*, 45 Misc.2d 403, 248 N.Y.S.2d 339, *aff'd as modified*, 24 A.D.2d 900, 264 N.Y.S.2d 886 (2d Dept. 1965); *People* v. *Beshany*, 43 Misc.2d 521 (1964); *People* v. *Rogers*, 46 Misc.2d 405 (Seneca Co. 1965); *People* v. *Berger*, 239 F. Supp. 216 (S.D.N.Y., 1965), in all of which the courts had said that § 813-c was available to test the admissibility of so-called "intangible" evidence.

Indeed, in *People* v. *Berger, supra,* the District Attorney specifically represented to the United States District Court that § 813-c was available to test the admissibility of eavesdrop evidence. See brief of District Attorney in *People* v. *Steinman,* Index No. 64 Civ. 3713, U.S.D.C., S.D.N.Y., incorporated by reference into *People* v. *Berger, supra.*

The statute in question (813-c) became effective in 1962. In the short time since its passage, the Court of Appeals, the Appellate Division, Second Dept., several Supreme Courts, the United States District Court, and the District Attorney had all, at one time or another, expressed the view that it applied to eavesdrop or other intangible evidence. The rights of appellants should not now be defeated because of a change in position. *Raley* v. *Ohio,* 360 U.S. 423.

III

The Court of Appeals had decided the issues herein adversely to appellants.

The issues in this case are substantially the same as in *Berger* v. *New York,* No. 615, October Term, 1966, *cert. granted* by this Court on December 5, 1966. Hence it cannot be said that the Court of Appeals has not spoken on the constitutional issues here present. This case and *Berger* were argued on the same day in the Appellate Division and in the Court of Appeals and were decided together in the latter court. The Court of Appeals was able to evade a decision of the constitutional issues here by a procedural device, but it has passed on them in *Berger,* and its evasion here should not stand in the way of appellants' rights to appeal.

CONCLUSION

The motion to dismiss should be denied.

Respectfully submitted,

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